MHES SDN BHD

v.

KUMPULAN SURIA SIGNS SDN BHD

HIGH COURT MALAYA, KUALA TERENGGANU
NIK HASHIM J
[CIVIL APPEAL NO: R3-12-58-98]
5 DECEMBER 2001

CONTRACT: *Construction - Lease - Whether letter of offer constituted a binding contract - Whether contract subject to terms and conditions in letter of offer - Whether defendant breached contract - Whether plaintiff had to fulfil pre-conditions in letter of offer for contract to become enforceable - Whether contract existed*

CONTRACT: *Damages - General damages - Award of damages - Principles applicable - Whether facts relating to claim pleaded - Whether damages proved - Whether award of general damages correct*

By a letter of offer, the defendant agreed to let his premises to the plaintiff on a monthly rental of RM3,500 subject to the payment of RM14,500 being the amount due by 15 April 1991. The plaintiff failed to pay the amount due by that date, and the defendant returned the booking deposit of RM3,500 paid by the plaintiff. The plaintiff alleged that it did not pay the amount due because the defendant did not carry out the repairs as stated in the letter of offer, and subsequently brought an action against the defendant alleging breach of contract and claiming damages. The learned Sessions Court judge allowed the plaintiff's claims and awarded RM20,000 as general damages due to hardship suffered by the plaintiff because of the defendant's breach of contract. The defendant appealed against this decision and the plaintiff also filed a cross-appeal claiming RM202,000 as general damages.

Held:

[1] On its true construction, the letter of offer did not constitute a contract binding in law but was only a record of terms which were agreed by the defendant and the plaintiff as a basis for the negotiations of a contract. However, since the plaintiff did not exercise the option in the manner of the terms and conditions of the letter of offer, no binding contract came into existence between the defendant and the plaintiff, and hence, the plaintiff could have no claim against the defendant. (pp 364 f, i & 365 a)

[1a] The return of the booking deposit was not an act of breaching the contract by the plaintiff as the refund was made on 7 May 1991, a date well after the period for payment of the amount due, which was on or before 15 April 1991, had lapsed. (p 365 a-b)

[1b] The obligations of the plaintiff in the letter of offer were pre-conditions to a tenancy contract and before they became enforceable, the plaintiff had to fulfil the pre-conditions by paying the amount due by 15 April 1991, which it failed to do. Thus, the defendant's obligations to repair were not to be equalled to the pre-conditional payment of the amount due by the plaintiff. (p 365 c)

[2] The basis for awarding damages was not known to the law of contract which requires all damages to be proved. Further, the facts relating to the claim for general damages were not pleaded and no evidence was called by the plaintiff through witnesses to prove the same. Hence, the award of the general damages was not right. (p 365 e)

[Defendant's appeal allowed; plaintiff's cross-appeal dismissed.]

Case(s) referred to:

Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd [1994] 3 CLJ 133 ***(refd)***

Ram Singh v. Bright Steel Sdn Bhd [1988] 2 CLJ 16; [1988] 1 CLJ (Rep) 272 ***(refd)***

Smith v. Hughes [1871] LR 6 QB 597 ***(refd)***

For the appellant/defendant - Mohan Singh; M/s KL Rekhraj
For the respondent/plaintiff - SG Lingam; M/s SG Lingam & Co

Reported by Suresh Nathan

JUDGMENT

Nik Hashim J:

The Appeal

This is an appeal by the defendant appellant against the decision of the learned Sessions Court judge dated 10 February 1998 in allowing the plaintiff respondent's claims and awarded a sum of RM20,000 as general damages with interest at the rate of 8% per annum from the date of filing to the date of judgment.

The plaintiff also filed a cross appeal against the said decision and claimed RM202,000 as general damages.

The Facts

Briefly the facts are that the defendant was the owner of a four storey building bearing the address No. 77 Jalan 1/91, Taman Shamelin Perkasa, Cheras, Kuala Lumpur (the said premises) and had allowed the estate agent Collings Hui Worldwide Sdn Bhd to seek and obtain tenants for the said premises (the agent).

The defendant agreed to let the said premises to the plaintiff on a monthly rental of RM3,500 subject to the terms as found in the letter of offer dated 2 April 1991 prepared by the agent and the said letter of offer at pp. 54-55 is now reproduced:

2nd April 1991

Kumpulan Suria Sdn. Bhd.
No. 18, Jalan 8/91
Taman Shamelin Pertama
Batu 3 1/2 Cheras
56100 Kuala Lumpur.

Attn: Mr. Mah/CC Lee

Dear Sir

RE: Lease of 4-Storey shophouse No. 77, Jalan 1/91, Taman Shamelin Perkasa, 2 1/2 Miles, Cheras, K. Lumpur

This is to confirm that you have agreed to lease the above premises on the following terms and conditions:

1.	SUBJECT PROPERTY	:	No. 77, Jalan 1/91, Taman Shamelin Perkasa, Cheras, Kuala Lumpur. (Whole Building).
2.	RENTAL	:	$3,500.00 per month payable monthly in advance.
3.	BOOKING DEPOSIT	:	Equivalent to one (1) month rent or $3,500.00 to be paid on or before 3rd April 1991.
4.	SECURITY DEPOSIT	:	Equivalent to three (3) months rent or $14,500.00 to be paid on signing of the Tenancy Agreement which shall be effected on or before 15th April 1991.
5.	ADVANCE RENTAL	:	One (1) month's rent.
6.	UTILITY DEPOSIT	:	$4,000.00 (covering electricity and water). Tenant to apply and pay all deposits to the relevant Authorities for Telephone.

7.	RENOVATION PERIOD FREE :	One and half (1 1/2) months before commencement of lease or from 15th April 1991 to 31st May 1991.
8.	PERIOD OF LEASE :	Three (3) years with an option to renew for another two (2) years on same terms and conditions except for rental which shall be either at prevailing market value or not to exceed a 15% incremental review over the preceeding rental rate, whichever is the lower.
9.	VACANT POSSESSION:	Upon full payment and signing of Tenancy Agreement.
10.	COMMENCEMENT OF LEASE :	1st June 1991
11.	STAMP DUTY AND PREPARATION OF TENANCY AGREEMENT :	To be borne by Tenant. The landlord shall undertake to do the following works for the Tenant, which shall be completed on or before 15th April 1991.
12.	OTHER CONDITIONS :	a) To fix a roller shutter on the ground floor (glass wall) and to install grills at the entrance of all back doors. b) To replace handrails at the staircase leading to the upper floors. c) To make good and replace rubber strips of windows. d) To replace Fuse box on all floors. e) To replace missing ceiling board on 3rd floor. f) To fix/replace all lightings at stairway/ corridor. g) To replace all water meter missing at the premises.

The Booking Deposit shall be collected on your behalf and upon your confirmation before your commencement of works as outlined in Clause 12 herein.

If you are agreeable to the above terms and conditions, the following sum of money shall be due from you and to be paid on or before 15th April 1991 otherwise the booking deposit of $3,500.00 will be forfeited.

Security deposit (3 months)	$10,500.00
Advance rental (1 month)	$ 3,500.00
Utility deposit (Electricity & Water)	$ 4,000.00
Sub-total	$18,000.00
Less booking deposit	$ 3,500.00
Total amount due from you	$14,500.00

Kindly confirm on the duplicate copy of this letter that you accept the above terms and conditions and return the same to us.

Thank you.

Yours faithfully HUI WORLDWIDE SDN. BHD.	We hereby accept the above terms and conditions
-sd- ... ANDREW WONG Senior Manager	-sd ... 3.4.91 Name: Date: MHES SDN. BHD. -sd- LOW KEIN KEE Business Development Manager.

The plaintiff paid a sum of RM3,500 as booking deposit and it was a term of the letter of offer that the booking deposit was forfeitable upon failure of the plaintiff to pay the amount due of RM14,500 on or before 15 April 1991.

The tenancy agreement was not signed because the defendant contended that the plaintiff breached the terms of the letter of offer when the plaintiff failed to pay the amount due of RM14,500 and the defendant returned the booking deposit sum of RM3,500 to the plaintiff by letter dated 7 May 1991 at p. 57 of record.

The plaintiff on the other hand argued that the plaintiff did not pay the amount due because the defendant did not carry out the repairs as stated in the said letter of offer.

The learned judge in his grounds of decision, ruled that based on the letter of offer a binding contract existed between the defendant and the plaintiff and held that it was the defendant who breached the contract when the defendant returned the booking deposit by letter dated 7 May 1991. Accordingly, the learned judge allowed the plaintiff's claim and awarded a sum of RM20,000 as general damages with interest at the rate of 8% per annum from the date of filing to the date of judgment.

The main issue in this appeal was whether there was a binding contract in existence between the defendant and the plaintiff.

Findings Of The Court

After hearing both parties, I, on 17 December 1998 agreed with the submissions of the learned counsel for the defendant that based on the evidence, there was no binding contract in existence between the parties. I now give my reasons.

For a contract to come into existence, the parties must have agreed upon the terms and conditions of the contract. In *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd* [1994] 3 CLJ 133, the Supreme Court at p. 139 para c referred to *Smith v. Hughes* [1871] LR 6 QB 597 which said "it was said that the existence of an agreement depends upon the intention of the parties, and that for there to be an agreement the parties must be *ad idem*, ie, there must be a consensus between them.

In the present case, on its true construction, the letter of offer did not constitute a contract binding in law but was only a record of terms which were agreed by the defendant and the plaintiff as a basis for the negotiations of a contract. It was an expression in writing of the parties present intention and willingness to enter into a contract on or before 15 April 1991, if the terms have been complied with. This is clear from cl. 4 of the said letter of offer.

By its terms, the letter of offer granted only an option to the plaintiff to be exercised on or before 15 April 1991 in return for RM3,500 consideration paid by the plaintiff subject to the fulfilment of terms of payment of the amount due. The evidence shows that the plaintiff failed to pay the amount due and failed to execute the tenancy agreement and as such the option lapsed after 15 April 1991. The payment of the amount due of RM14,500 is a precondition of the contract for tenancy and as the plaintiff has failed to pay the amount due, there is no consideration for the contract of tenancy. This is because cl. 9 of the letter of offer clearly states that the plaintiff may only have vacant possession upon full payment of the amount due and the execution of a formal tenancy agreement. Since the plaintif did not exercise the option in the manner of terms and conditions of the letter of offer, no binding contract came into

existence between the defendant and the plaintiff, and hence, the plaintiff can have no claim against the defendant. Thus, the learned judge erred when he found that there was a binding contract existed between the defendant and the plaintiff based on the letter of offer. The return of the booking deposit cannot be considered as an act of breaching the contract by the defendant as the refund was made on 7 May 1991, a date well after the period for payment of the amount due has lapsed after 15 April 1991.

The learned judge also erred when he failed to take into consideration that the obligations of the plaintiff in the letter of offer are preconditions to tenancy contract whereas the defendant's obligations are not. Before the obligations of the defendant to repair as provided under cls. 11 and 12 arise and become enforceable, the plaintiff has to fulfil the preconditon by paying the amount due on or before 15 April 1991 which the plaintiff failed to do. Thus, the defendant's obligations to repair are not to be equalled to the preconditional payment of the amount due by the plaintiff.

Regarding the award of the general damages of RM20,000 to the plaintiff, the learned judge made the award on the ground that it was a reasonable sum due to the hardship suffered by the plaintiff because of the defendant's breach of contract. With respect, the learned judge erred here because the basis of awarding damages in his judgment is not known to the law of contract which requires all damages to be proved (see *Ram Singh v. Bright Steel Sdn Bhd* [1988] 2 CLJ 16; [1988] 1 CLJ (Rep) 272 SC). Further, the facts relating to the claim for general damages were not pleaded and no evidence was called by the plaintiff through the witnesses to prove the same. Hence, the award of the general damages was not right.

Thus, by reasons of the matters aforesaid, I allowed the appeal with costs and the order of the learned judge was set aside. The plaintiff's cross appeal was dismissed.